William Powell *alias* Hinſon Eſq; *Plaintiffe*; *The Warden and Fellows of* All-ſoules *Colledge in* Oxford *Defendants.*

In the Chancellors Court of the Univerſity of Oxford *in a pretended Cauſe of Dammage.*

THis Suit is in the nature of an Action of the Caſe at the Common Law, and the end of this Action is the ſame with that of an Action on the caſe at Law, and that is to have a Reparation by way of dammage for a wrong ſuppoſed to be done by the Defendants to the Plaintiffe.

The wrong complained of in the preſent Caſe is a preterition made by the Defendants of the Plaintiffe, in the renewing of a Leaſe for years of a Meſuage and Lands in *Wheatley* in the County of Oxon, which Leaſe, as the Plaintiffe pretends, the Defendants have to his dammage renewed unto *George Herne*.

1. Wherein I do agree firſt that the Leaſe hath been ſo renewed by the Defendants to *George Herne*.

2. I do admit that this renewing was to the Plaintiffes dammage.

But as I ſhall repreſent the truth of the Caſe to be; I conceive this dammage ſo much complained of by this Action will fall out to be within the reaſon of thoſe Caſes of the Common Law, that being *damnum abſque injuria*, there is no puniſhment of ſuch Acts by any recompence to be given in way of damage by any action whatſoever.

And therefore whereſoever a man hath liberty to do any act which no Law of the Land forbids, no Action at Law lieth againſt him for the doing of ſuch an Act.

A Schoole-maſter teaching Schoole in a Towne brought an Action upon the Caſe againſt another that afterwards ſet up a Schoole in

11 Henry 4. Stat. in accon. sur le Case

the same Town whereby those Schollars that before gave him twenty pence a quarter, now will give him but twelve pence a quarter, and this being *damnum absque injuria*, it was adjudged that the Action will not lye.

So in the Case of a new Mill, erected upon the same streame, by a Lord of a Manor, to the prejudice of the Lord of the next Manor, who hath an ancient Mill standing upon the same streame, whereby the sute to the old Mill is lessened and withdrawn, yet this Action lies not, for albeit it be a dammage to the Owner of the old Mill, yet it is *absque injuria*, there being no Law that makes such restraint either in the one case or in the other.

22 of H. 6 14. Bacon. Jur le case, 57. and 42.

To apply this to the present Case, there are three Competitors to the Defendants for the renewing of the said Lease at *Whatcly*.

1. The Plaintiffe as Executor to Sir *Edward Powell*.

2. Mr *Bateman*.

3. Mr *George Herne*.

The Colledge being the Defendants, are not only not prohibited, nor under any restraint for the renewing of it, but are rather enabled by the Statute of 18. *Eliz.* the present Lease being run within three yeares of expiration, to renew this Lease to whom they please.

So as this being a power recommended to their own liberty, and being by them executed according to their power to them given by that Law, *legis executio non habet injuriam*, and no man can be said to do a wrong, *qui jure suo utitur*.

The Defendants are the more to be justified herein, for that they did not meerely as an act of power, nor inconsiderately renew it; but first calling in all parties, and suffering them to interplead before them, and hearing, and examining their reasons, *hinc & inde*, they did at length upon a full and deliberate consideration declare the right of renewing this Lease to belong to *George Herne*, and accordingly renewed it to him; wherein I conceive that both in Law and Equity they have done an Act that is most Collegiate, and such as best suits with the honour of their Colledge: and this will the better appeare by the Case it selfe as it stands in judgement upon the series and course of the Leases themselves made by their Predecessors of this Land now in question.

Richard Powell being in the yeare 1634. possest of a Lease for years before that time made by *All-soules* Colledge, does in the said yeare 1634. without making any actuall surrender thereof, accept of a new Lease for yeares thereof from the said Colledge.

This his acceptance of the said new Lease is in Law an absolute surrender of that old Lease, albeit no actuall surrender were by him made

made of the ſaid old Leaſe, and the neglect of the then Warden and Scholars of the ſaid Colledge to take in the ſaid old Leaſe is no hinderance at all to the operation of the ſaid ſurrender in Law.

Then doth *Richard Powell* in the yeare 1638. for 200. li. to him paid by *Bateman*, aſſigne this renewed Leaſe unto *Bateman*; this is a good aſſignment of a good Leaſe, then in being unto *Bateman*.

After this *Richard Powell* having ſtill in his hands the ſaid old Leaſe not actually ſurrendred, but yet determined by ſuch ſurrender in Law (*ut ſupra*) doth in the yeare 1639. for 340 li. paid by *George Herne* amongſt other things grant the ſaid old Leaſe, and the Lands thereby demiſed to the ſaid *George Herne*, who preſently redemiſed the ſaid Lands unto the ſaid *Richard Powell* at 40. li. rent *per annum*, and *Powell* ſtill retained in his own hands the ſaid old Leaſe.

The ſaid *Richard Powell* afterwards in the yeare 1641. repaires to the Colledge, and concealing from them his ſaid aſſignment to *Bateman*, and his ſaid grant to *Herne*, without the privity or concurrents of the ſaid *Bateman* and *Herne*, by their joyning with him in their making of an actuall ſurrender of their, or either of their eſtates to the ſaid Colledge, upon his giving in of the ſaid old Leaſe made in the yeare of our Lord, 1626. obtaines a new Leaſe from the ſaid Colledge to begin immediately, which he afterwards mortgaged to Sir *Edward Powell*.

1. The Leaſe renewed in 1634. to *Richard Powell*, then being Tenant in poſſeſſion, and which he afterwards aſſigned to *Bateman*, was the only good Leaſe in the Caſe.

2. The grant to *Herne* of an old Leaſe then pretended to be *in eſſe*, is not good in regard the Leaſe intended was determined by *Powell* acceptance of a new Leaſe in 1634.

3. The Colledge new Leaſe to *Richard Powell* in the yeare 1641. was void, for that the Leaſe to *Bateman* was then in being for many yeares then to come, and that Leaſe not then ſurrendred.

4. *Batemans* Leaſe comming afterwards within three yeares of expiration, the Colledge had then power to let a Leaſe to whom they pleaſed.

And they afterwards making this Leaſe to *George Herne*, this is a good execution of their power to them given by the Statute; and albeit a dammage of the Plaintiffes expectation to renew, yet no injury at all to the Plaintiffe for the reaſons before delivered.

And ſo no cauſe of Action to the Plaintiffe.

As to the objection that *Richard Powell* upon ſuch his renewing in 1641. did pay to the Colledge 26. li. 13. s. 4. d. for a Fine.

It is anſwered, if any ſuch money were by him paid for ſuch a void

Leasethen to him made, and by him afterwards assigned to Sir *Edward Powell* this 26.li.13.s.4.d. and the dammages for the same if any due to any person, is due in equity to the Executors of the said *Richard Powell*, who in his own wrong departed with that money and cannot at all be due to the Plaintiffe as Executor of Sir *Edward Powell*, who as to that payment was and is a meere stranger to the Colledge, nor doth the now Plaintiffe by his Libell make any claime thereunto.

26 Septem. 1656. Charles Holloway
for the Defendants.

William Powell Esquire, Plaintiff.
The Warden and Fellowes of *All-soules* Colledge in *Oxon*, Defendants, in the Chancellors Court of the Vniversity of *Oxon*, in a Cause of damages.

THere is no cause why the Plaintiff should recover dammages against the Defendants, for these reasons.

1. There is neither Law nor equity to compell them to Lease their land to any one; for it was lawfull for them to doe what they would with their own, observing this rule, *sic utere tuo ut alienum non ledas*, as here they did, for they did no hurt to Sir *Edward Powell* by making their Lease to *Heron*, but left Sir *Edward* as they found him.

2 *Heron* was first deceived, and it was good reason he should be first repaired; *Qui prior est tempore potior est jure.*

3. But if the Colledge had made the last lease to Sir *Edward Powell*; had not *Heron* as good equity to have sued the Colledge for dammages, as Sir *Edward Powels* Executors pretends to now? certainly there had been *aequale jus*, if any there was at all in either side to sue the Colledge.

4. All the pretence for the Plaintiff, is, because his testator bought the last lease made in 1641. This in truth was no Lease, it being made void by Act of Parliament of 18. *Eliz.* in which every mans consent was had for him and his heirs, that such Lease should be void because the former was not within three yeers of expiration, which was unknown to the Colledge, but well known to *Richard Powell* the Lessee, who wittingly deceived himselfe, that he might cozen Sir *Edward Powell*, the Plaintiffs testator.

5. If the case were of a body naturall, and that the Plaintiff or his testator had susteined damage by it by an act done unawares (as here by making a void Lease) yet *ignorantia facti excusat.*

6. No crime can be imputed to a body politick aggregate, and this sute is brought against a body politick, and the charge of this Libell is grounded upon a deceipt in making a Lease to a wrong man, which as is supposed, ought to have been made to the Plaintiffs testator. Now deceipt is a crime, and a body without a soule (although it be *All-soules*) cannot be guilty of a crime, and so not be charged to pay dam-

ages, or any way puniſhable for a crime: And therefore if any ſute would have lien, it muſt have been againſt ſome naturall perſons of that body; but to charge them as a body politick, there is no colour.

7. As for the fine paid to the Colledge for the void Leaſe, he paid it of his owne wrong, for *non decipitur qui ſcit ſe decipi*, he knew well he paid it for a void Leaſe, and on purpoſe to cozen ſome body with it, As appears by his ſo ſpeedy putting it to ſale to Sir *Edward Powell*. And it is cleer this *Richard Powell* (if he were living) could have no remedy againſt the Colledge to recover back this fine, for if he ſhould, it would give countenance to ſuch fraudulent practiſes which the Law abhorreth; and by like reaſon this *Richard Powel's* Executor, nor any claiming from him can be in better caſe to recover the fine back againe, then *Richard Powell* himſelfe was; for *titulus derivativus* can be no better then *primitivus*:

November 8. 1656.

Tym. Tourneur.

William Powell alias *Hinſon* Eſquire, Plaintiff. The Warden and Fellowes of *All-Soules* Colledge in *Oxford*, Defendants.

In the Chancellors Court of the Univerſity of Oxford, *in a pretended Cauſe of damage.*

1. I Conceive that the Leaſe being void by an Act of Parliament, no remedy lies againſt the Colledge, becauſe the Act which makes it void, gives no remedy, it being lawfull and valid before.

2. I conceive no remedy for this void Leaſe doth lie againſt the Colledge, becauſe in ſuch caſes no remedy was ever given, or damages ever recovered, though many void leaſes have been made ſince the Stat. of 13. and 18. *Eliz.*

3. The Stat. of 18. *Eliz.* reſolves the queſtion, for that Stat. makes void all Bonds and Covenants entred into for making good ſuch void leaſes. Now Bonds and Covenants cannot make the Leaſe valid that is void, but only give a ſatisfaction by way of damages; But by that Law ſuch ſecurities as found in ſatisfaction and damages, are made void; *à fortiori*, an equity imploid is void, for *equitas ſequitur legem.*

4. And in truth, if an equity ſhould be good againſt the Colledge to make ſatisfaction for the damages which ſuch perſons ſhould ſuſtain for want of an intreſt in law in the lands, then the Stat. *ex obliquo* muſt needs be evaded, and eccleſiaſticall corporations in ſucceſſion depauperated (the miſchief ſolely intended to be remedied by the law) for the recovery of damages, being againſt the corporation, not againſt the naturall individuall perſons, that made that Leaſe void, and received the benefit of the Fine, then it doth clearly follow though the corporation in ſucceſſion enjoies the land and the profits of it, yet if they muſt yeild as much in dammages, what is this more in effect, but receiving with one hand, and paying with another? And ſo the Colledge in ſucceſſion is deteriorated in the matters provided againſt by the Parliament.

Fruſtra petis quod ſtatim reddere cogeris.

5. Though the Colledge have collaterall ſecurity to ſave them harmleſſe; for what by law ſhall be recovered againſt them in ſuch a caſe, if by law nothing can be recovered againſt them (though *de facto* there be an appearance of it) they ſhall never have any benefit of their collaterall ſecurity, ſo the Colledge is the party politick againſt whom theſe damages muſt be effectually recover'd, and for a voluntary re-imburſement, it is no argument one way or other.

6. For the Court where this controverſie is depending (*viz.* the

the University Court of *Oxford*, which Court cannot have jurisdiction in this cause for two reasons.

1. Because they have no jurisdiction but by ancient usage or Letters Patents. By usage they can have no jurisdiction in this Cause, because the ground of the question or controversie is upon the Stat. of 13. and 18. *Eliz.* there being no such case that could come in question before those Statutes. So not by ancient usage, and then not by Letters Patents, for they have no jurisdiction granted by Letters Patents herein since those Statutes.

And secondly, Because the King cannot create a Court of equity by Charter; and there is no Act of Parliament that doth confirm their jurisdiction herein, whether they will lay the foundation of their jurisdiction herein, either by ancient usage or Letters Patents, because the Act of Parliament by which the jurisdiction of the University Courts of *Oxford* and *Cambridge* are confirmed, and which doth confirme their jurisdictions formerly enjoied by usage or Letters Patents, is a Prior act, *viz.* (13 *Eliz.*) to the Act of Parliament upon which this question doth properly arise, *viz.* 18. *Eliz.*

7. Admit they have a jurisdiction of the cause, yet they must judge *secundum legem terræ* according to the Law of the Land, and not according to the civill Law not formerly used in *England*.

1. Because no part of the Civill Law is of force in *England* (not in the Ecclesiastical Courts of *England*) but what hath been anciently used in *England*, and is thereby become the Law of *England*, and in truth so much of the civill Law as hath been anciently used in *England*, is the common Law of *England* in those cases.

2. Though the University Courts of *Oxford* and *Cambridge* do *in formula juris*, that is to say, in the method of their procedings, seem rather to follow the ecclesiastical Courts, then the common law-Courts & the advocats there are civilians, yet in truth they are no ecclesiastical Courts, but Courts of Law and equity mixt, established by usage, Letters Patents and Acts of Parliament, and their judgements and sentences doe bind the person and goods to execution, and are as the Court of the Marshes of *Wales* that were mixt of law and equity, and so though they have a peculiar jurisdiction in respect of the place, yet in their judgements and sentences they must judge *secundum legem terræ*, as the superior Courts of Law or equity would do in those cases.

From all which I conclude that the University Court of *Oxford* cannot give damages against *All-Soules* Colledge in this case.

November 10. 1656.

George Starkey.